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No. 98-1929

In The

Supreme Court of the United States

AMERICAN LUNG ASSOCIATION, et al.,

Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY
and Carol M. Browner, Administrator,
United States Environmental Protection Agency,

Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
District Of Columbia Circuit

REPLY BRIEF

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AMERICAN LUNG ASSOCIATION'S REPLY TO ENVIRONMENTAL PROTECTION AGENCY'S OPPOSITION TO CERTIORARI

1. EPA's Decision Was Remanded Because It Is Arbitrary and Capricious.

Petitioners have demonstrated that the denial of costs and attorneys' fees in *ALA v. EPA* "because 'the agency may be able to justify its position with a simple response containing no reformation of the challenged portion of the rules' ", Pet. App. 3, is in conflict with the *Ruckelshaus* and *Shalala* decisions of this Court and the decisions of four courts of appeals granting fees in cases where agency decisions were remanded on grounds that would allow the agency to re-adopt the challenged portion of the rules. While the government necessarily acknowledges that the *ALA* Court found "the Administrator had not adequately explained her decision, and remand[ed] the case to permit her 'to explain her conclusions more fully'," Opp. at 3, EPA attempts to avoid the conflicts with these cases by arguing that the decision below did not expressly "find that EPA's decision was unreasonable, arbitrary, or capricious." Opp. at 7. EPA argues that since the Court did not expressly declare EPA's decision to be arbitrary and capricious, then this Court should reject the petition because ALA won nothing of substance and cannot be eligible for an award of costs and fees.

The government's argument is nothing more than a red herring, placing form over substance, because it ignores the fundamental tenet of administrative law that whenever "the agency has failed to offer the rational connection between facts and judgment," its decision fails to "pass muster under the arbitrary and capricious standard." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 56 (1983). The Court of Appeals unquestionably remanded EPA's decision because the Agency failed to explain why "SO2 bursts do not amount to a 'public health' problem within the meaning of the Act," and neglected its "heaviest of obligations to explain

and expose every step of its reasoning." *ALA v. EPA*, 134 F.3d at 392 [Pet. App. 15]. Identifying fundamental contradictions between the factual evidence of harm to the health of asthmatics and EPA's conclusion that these effects are not a public health problem, Pet. App. 14, the Court concluded "[w]ithout answers to these questions, the Administrator cannot fulfill her responsibility under the Clean Air Act to establish NAAQS 'requisite to protect the public health'." Citing *Motor Vehicle Manufacturers*, the Court reiterated "we have always required the Administrator to 'cogently explain why [she] has exercised [her] discretion in a given manner.' " Pet. App. 15. "Given the gaps in the Final Decision's reasoning, we must remand this case to permit the Administrator to explain her conclusions more fully." Pet. App. 16.

Ultimately, the Court did not decide the central legal issue presented by ALA – that EPA may not lawfully decline to protect asthmatics from known adverse health effects caused by exposure to ambient concentrations of SO2 – but not because the Court found any fault with petitioners' argument. The Court explained that it would defer the central legal issue ALA raised "[s]ince in this case the Administrator has failed adequately to explain her conclusion that no public health threat exists, we can leave the issue of the scope of her authority for another day." Pet. App. 17. The Court nonetheless went out of its way to remind the Agency that "although our cases make clear that the Administrator has broad discretion to establish an 'adequate margin of safety' above and beyond what scientific certainty prescribes . . . , they do not necessarily establish the converse proposition – that the Administrator may decline to establish a margin of safety in the face of documented adverse health effects." Pet. App. 16-17.

At no point did the Court reject ALA's central legal arguments. The Court did, however, find EPA's decision to be fundamentally flawed because it failed to satisfy one of the most basic tests of reasoned decisionmaking – the obligation to "articulate a satisfactory explanation for

its action including a 'rational connection between the facts found and the choice made.' " *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins.*, 463 U.S. at 43, citing *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962).

EPA cannot avoid the arbitrary and capricious nature of its decision or the significance of a court order remanding that decision simply because the *ALA* Court did not expressly declare EPA's decision to be arbitrary and capricious. Certainly, a consistent line of prior decisions by this Court and the D.C. Circuit leaves no doubt that the basis for remand in this case – the Administrator's failure to adequately explain her decision – is arbitrary and capricious without the Court having to use these magic words in every case.

This Court has recently reaffirmed that the Administrative Procedure Act's scheme for "reasoned decisionmaking" requires "[n]ot only [that] an agency's decreed result be within the scope of its lawful authority, but the process by which it reaches that result must be logical and rational. Courts enforce this principle with regularity when they set aside agency regulations which, though well within the agencies' scope of authority, are not supported by the reasons that the agencies adduce." *Allentown Mack Sales & Service, Inc. v. NLRB*, 522 U.S. 359, 374 (1998). The decisionmaking scheme enacted for setting NAAQS under the Clean Air Act is no different. It too allows a court to reverse "any action of the Administrator . . . found to be (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 42 U.S.C. § 7607(d)(9).

Similarly, the D.C. Circuit has frequently held that an agency's failure to adequately explain its decision is arbitrary and capricious. " 'The requirement that agency action not be arbitrary and capricious includes a requirement that the agency adequately explain its result.' *Public Citizen, Inc. v. FAA*, 988 F.2d 186, 197 (D.C.Cir. 1993); *Federal Election Comm'n v. Rose*, 806 F.2d 1081, 1088 (D.C. Cir. 1986)." *Dickson v. Secretary of Defense*, 68 F.3d 1396

(D.C.Cir. 1995). Thus it is clear that the *ALA* court's remand of EPA's decision not to revise the NAAQS is based on a deficiency in agency decisionmaking that is arbitrary and capricious. This deficiency is not a minor flaw of little consequence.

2. Litigation Winning Remand of Arbitrary and Capricious Decision Achieves "Some Success"

The fundamental issue in this case is whether it is appropriate to deny costs and fees in cases where the agency decision is remanded because it fails the duty to adequately explain the result (or any other test of arbitrary and capricious decisionmaking), but can theoretically be remedied by the agency on remand without necessarily changing the result.

The Court of Appeals denied ALA's motion for a determination of eligibility for an award of costs and fees on the ground that petitioners had not achieved " 'a modicum of success of the merits' because '[t]he agency may be able to justify its position with a simple response containing no reformulation of the challenged portion of the rules.' " Pet. App. 2-3. The implication of this decision is that winning a remand of an arbitrary and capricious agency action, no matter how serious the error by the agency as long as it is not an error of law that prohibits the agency from re-adopting its initial result on remand, may not satisfy the modicum of success test for determining that fees and costs are appropriate.

The remand of most arbitrary and capricious decisions – such as failure to explain, failure to provide adequate notice in the proposal of the final outcome, failure to consider relevant factors, failure to respond to significant comments, failure to consider all relevant aspects of the problem – almost always allow the agency to re-adopt the remanded position once the error in decisionmaking is remedied. The necessary implication of the position argued by the government, and adopted by the Court below, is that such decisions be treated as not

satisfying this Court's "some success" test in *Ruckelshaus v. Sierra Club*, 463 U.S. 680 (1983), for determining when fees are "appropriate" under § 307(f), or as mere procedural victories. But such a result is clearly at odds with the rationale underlying the decision in *Ruckelshaus*.

This Court concluded that Congress chose the phrase "whenever . . . appropriate" to "expand the class of parties eligible for fee awards from prevailing parties to partially prevailing parties – parties achieving some success, even if not major success. Put differently, by enacting § 307(f), Congress intended to eliminate both the restrictive readings of 'prevailing party' adopted in some of the cases cited above and the necessity for case-by-case scrutiny by federal courts into whether plaintiffs prevailed 'essentially' on 'central issues'." *Id.*, 688.

This Court's decision rested in part on an analysis of the decision in *NRDC v. EPA*, 484 F.2d 1331 (1st Cir. 1973) cited by the House committee in its 1977 report explaining the basis for the language that became § 307(f). In *NRDC*, the court of appeals granted fees for success on claims challenging EPA's approval under the Clean Air Act of state implementation plans that included, *inter alia*, a claim challenging EPA's determination that the State has "adequate personnel, funding and authority to carry out [its] implementation plan." *NRDC v. EPA*, 478 F.2d 875, 890-891 (1st Cir. 1973). In response to that claim, the court determined it lacked the information needed to determine whether the Administrator had made "a reasoned judgment," and "direct[ed] the Administrator to provide us with a detailed statement of his rationale for concluding . . . that Massachusetts . . . will have adequate personnel, funding and authority. . . . " *Id.*, 891. In all relevant respects, the First Circuit's decision on that claim is similar to the *ALA* court's remand for further explanation by the Administrator at issue here.

But unlike the decision here, the First Circuit granted fees for this claim as well as other claims in that case. That outcome is particularly relevant here because the House committee relied upon the First Circuit decision to

explain that it "did not intend that the court's discretion to award fees should be restricted to cases in which the party seeking fees was the 'prevailing party.' In fact, such an amendment was expressly rejected by the committee, largely on the grounds set forth in NRDC v. EPA, 484 F.2d 1331, 1388 [sic] (1st Cir.1973)." H.R. Rep. No. 95-294, 95th Cong., 1st Sess. 337 (1977). This Court, in turn, relied upon the *NRDC* decision to assess the intent of Congress, and to conclude "that adoption of the 'when appropriate' standard was intended to permit awards of fees to all partially prevailing parties. After all, this was just what the facts were in NRDC v. EPA." *Ruckelshaus* at 691. Since the First Circuit's decision awarding fees for a remand to EPA for further explanation in *NRDC* was included in what Congress intended be treated as "appropriate" for an award of fees when it enacted § 307(f), and was included within what this Court understood to be a "partially prevailing" party in *Ruckelshaus*, then the decision below denying fees for similar relief is clearly in conflict with the case law of this Court.

Resolving this conflict is essential if the fee-shifting provision of § 307(f) is to achieve Congress's purpose "to encourage litigation which will assure proper implementation and administration of the act or otherwise serve the public interest." H.R. Rep., 337. Proper implementation and administration of the Act clearly requires decisions that are adequately explained and not arbitrary and capricious. To the extent Congress has provided for the reversal of arbitrary and capricious decisions in § 307(d)(9), it has expressed an intent that decisions that are arbitrary and capricious because they are not supported by a rational connection between the facts found and the action taken should not be affirmed. ALA's success in winning a remand of EPA's decision on this ground must necessarily serve the proper implementation and administration of the Act. A decision that serves the proper implementation and administration of the Act, must also have achieved "some success" and therefore be eligible for an award under § 307(f).

3. Denying Fees For Remand of an Arbitrary and Capricious Decision Creates a Conflict With Decisions of Four Courts of Appeals.

The denial of costs and fees in this case also creates a conflict with the decisions of the four courts of appeals that have authorized fees under the "whenever . . . appropriate" test in cases where agency action has been remanded on arbitrary and capricious grounds (*see* Pet. 19-22) precisely because the EPA decision remanded in *ALA* could not pass muster under the arbitrary and capricious standard. The remand in *ALA* is indistinguishable from these Fourth, Fifth, Ninth and District of Columbia circuit decisions where fees were awarded after agency decisions were remanded because they failed similar or other tests of arbitrary and capricious decisionmaking. These conflicts need to be resolved by this Court.

4. ALA Also Satisfies "Prevailing Party" Tests.

Although this Court has made clear under the CAA that the measure of success sufficient to satisfy the threshold requirement for an award of fees under § 307(f) need not achieve the degree of success required to satisfy the "prevailing party" test, ALA also has achieved success sufficient to satisfy this Court's criteria for a prevailing party. In *Texas State Teachers Assn. v. Garland Independent School District*, 489 U.S. 782, 791-792 (1989) and *Shalala v. Schaefer*, 509 U.S. 292, 301 (1994), the Court concluded prevailing party "status [is] obtained 'if the plaintiff has succeeded on any significant issue in litigation which achieve[d] some of the benefit . . . sought in bringing suit.' "

EPA argues that this prevailing party test[1] has not been satisfied because "[a]t bottom, the court of appeals'

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[1] EPA offers no authority for the contention implied by its reliance on cases construing prevailing party statutes, i.e., the Civil Rights Act, 42 U.S.C. § 1988 and the Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1)(B), that such cases prescribing

decision does not provide petitioners with any of the benefit they sought in bringing suit since EPA is not required to reconsider or modify the substance of its decision." Opp. at 7. Assuming, *arguendo*, that prevailing party tests might be relevant to satisfying the less restrictive "whenever appropriate" test in § 307(f), clearly ALA has achieved results that include some of the relief sought in bringing suit.

First, the relief obtained from the litigation includes both the remand ordered by the Court and the post-decision commitment by EPA to conduct a rulemaking on remand and to make a final decision no later than December 2000. In a Settlement Agreement between petitioners and EPA, that was finalized following publication by EPA of notice announcing the terms of the Agreement and inviting comment pursuant to § 113(g) of the CAA, 42 U.S.C. § 7413(g), EPA agreed "to undertake a remand proceeding in accordance with the time lines for action on the remand and for solicitation of comment set forth in [the Federal Register Notice published at 63 Fed. Reg. 24,782-784]." The Notice announced EPA's agreement that "EPA will propose its response to the SO2 NAAQS remand for public comment in the summer of 1999 and take final action no later than December 2000." *Id.*, 24,783/1.

Under the precedent of this Court, the relief obtained directly from EPA in lieu of further litigation to compel a rulemaking under judicially prescribed deadlines is relevant to determining whether ALA is a prevailing party. "The fact that respondent prevailed through a settlement rather than through litigation does not weaken her claim to fees." *Maher v. Gagne*, 448 U.S. 122, 129 (1980). The Court even noted that the legislative history of § 1988, a

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prevailing party tests are relevant to a fee claim under the less restrictive "whenever appropriate" test of the CAA.

prevailing party statute, "expressly stated that 'for purposes of the award of counsel fees, parties may be considered to have prevailed . . . without formally obtaining relief.' " *Id.*

The total package of relief, including the judicial remand which requires further action by the Administrator to remedy her failure to adequately explain her decision, and the Settlement Agreement which defines that action to include a new rulemaking by a date certain, obtained a significant portion of the relief ALA sought. If ALA had won all the relief it sought, it would have won a remand as part of a decision declaring unlawful EPA's failure to extend the protection of air quality standards for sulfur oxides to prevent its adverse effects on asthmatics' health. ALA nonetheless achieved a major portion of its purpose for bringing suit by winning a remand with instructions for the Administrator to resolve the fundamental conflict between her findings that "repeated occurrences of exposure to such effects should be regarded as significant from a public health standpoint," Pet. App. 10, and "it is clear that 5-minute SO2 ambient concentration peaks pose a health threat to sensitive exposed populations," *id.*, with her final decision "that a new national standard was unnecessary." Pet. App. 8-9. That remand clearly provided the necessary predicate for EPA's commitment to conduct a new rulemaking, which EPA would never have agreed to if its decision had been affirmed by the Court and become settled Agency precedent. Equally important, ALA suffered no loss with regard to any of its legal claims that the Court deferred to another day.

As a result of this litigation, EPA is now required to reconsider its decision in a new rulemaking with instructions to resolve the conflict between the evidence EPA found of health effects to asthmatics caused by SO2 bursts and the statutory obligation to protect public health with an adequate margin of safety. This, indeed, changes the legal relationship between ALA and EPA, and accomplishes more than simply giving ALA another

chance to persuade that protection for asthmatics is required. It also requires EPA to remedy an arbitrary and capricious decision that failed to provide a rational connection between the facts found and the action taken. This result satisfies the traditional tests for establishing prevailing party status, and *a fortiori*, is a result that satisfies the less restrictive test for an award of fees and costs under § 307(f).

CONCLUSION

The conflicts between the denial of fees and costs in this case and the decisions of this Court governing eligibility for fees under § 307(f) as well as eligibility for fees under prevailing party statutes, and the conflicts with decisions granting fees in similar remand situations in four circuits should be resolved by this Court to ensure the effective implementation and administration of the environmental statutes of the Nation.

Respectfully submitted,

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